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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052197
Party	Defendant Supercar Collectibles Limited
Correspondence Address	Heather J. Kliebenstein Merchant & Gould P.C. 3200 IDS Center, 80 South Eighth Street Minneapolis, MN 55402-2215 UNITED STATES
Submission	Other Motions/Papers
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Date	05/09/2011
Attachments	GMCIN-008M-OppMotionExtend.pdf ( 19 pages )(3606735 bytes ) GMCIN-008M-DecBuyan.pdf ( 17 pages )(2585721 bytes ) GMCIN-008M-MotionStrike.pdf ( 18 pages )(3199590 bytes ) GMCIN-008M-MotionJudgment.pdf ( 2 pages )(220782 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of United States Trademark Registration No. 2,049,847

Terri Yenke Gould, Executor	)	
	)	Cancellation No.:92052197
Petitioner,	)	
	)	
vs.	)	
	)	
General Marketing Capital, Inc./Supercar	)	
Collectables Limited	)	
	)	
Respondent.	)	
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**Opposition to Petitioner's "Emergency" Motion to Extend Testimony Period**

Registrant/Assignee (hereinafter "Registrant") General Marketing Capital, Inc. hereby opposes the motion filed by Petitioner Terri Yenke Gould, Executor of the Estate of Donald Yenke (hereinafter "Petitioner") seeking a seven (7) day extension of the Petitioner's testimony period. As explained fully below, the grounds for this opposition are that a) the motion to extend should not be considered because it was not served in accordance with 37 C.F.R. §2.119; b) the motion to extend, if considered, should be denied because it fails to state good cause for the requested extension and c) the motion to extend, if considered, should be denied as moot in view of Registrant's contemporaneously-filed Motion to Strike Testimonial Declarations Filed by Petitioner (hereinafter the "Motion to Strike").

Submitted in support of this motion is the Declaration of Robert D. Buyan, Esq. and accompanying Exhibits A through H and Respondent's Motion to Strike Testimonial Declarations

Filed by Petitioner.

### **Background**

The YENKO mark is not merely a surname and it was not established by Donald Yenko. Rather, it is a trademark for automobiles and related products, including automotive parts, accessories, scale models, etc. The YENKO trademark was first established by a corporate entity named Yenko Chevrolet, Inc., which was an automotive dealership operated by Donald Yenko's parents. A separate corporate entity named Yenko Sportscars, Inc. was subsequently formed. That entity filed for and obtained United States Trademark Registration No. 0930794 for the mark YENKO + Design for sports cars, based on an alleged date of first use of 1941 (i.e., when Donald Yenko was just about 14 years of age). Yenko Sportscars, Inc. was in the business of selling YENKO Chevrolets. Subsequent to Donald Yenko's death in 1987 Yenko Sportscars, Inc. ceased doing business and allowed its trademarks to become abandoned. United States Trademark Registration No. 0930794 owned by Yenko Sportscars, Inc. became expired in 1992 due to non-renewal.

Neither Yenko Chevrolet, Inc. nor the heirs of Donald Yenko made any perceptible effort to continue the business of Yenko Sportscars, Inc. They even failed to service the continuing market for replacement parts and ancillary products relating to the Yenko Chevrolets that has been sold in the 1960's through 1980's. In the early 1990's Respondent recognized that Yenko Sportscars, Inc. had gone out of business and that no one was serving the market for replacement parts or accessories for Yenko Chevrolets. In the early 1990's, Respondent began selling some Yenko items in its public catalog and in the mid 1990's Respondent embarked on a business endeavor with a gentleman named

David Heth, who proceeded to file an application for registration of a YENKO word/design composite mark. Ultimately, Mr. Heth disappeared and Respondent obtained a court judgment against him. On the basis of that judgment, Respondent recorded a security interest on the trademark application that had been filed by Mr. Heth and also obtained Respondent's initial registration of the YENKO word mark.

Over the next decade and a half, Respondent continued to make investments of time and money, expanding its catalog offerings of Yenko parts and accessories in response to the needs of Yenko Chevrolet owners, without any objection from Petitioner. In 2009, because of its long standing relationship with General Motors<sup>1</sup>, Respondent was able to interest GM's management in manufacturing new Yenko Camaros. After months of substantive license negotiations with GM, the collapse of the auto industry and GM's bankruptcy caused GM to withdraw from the negotiations. Since then, Respondent has worked to gain the interest of a couple of established and respected aftermarket modifiers who would be in a position to make and distribute new Yenko Chevrolets to Chevrolet dealerships in a highly professional and safe manner. These business opportunities have come about through Respondent's hard work and perseverance since the early 1990's with not a word of objection from Petitioner until late 2009.

Respondent has also expended considerable time, effort and money to register and protect the

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<sup>1</sup> Respondent's founder, Jeff Leonard, is a long-standing muscle car enthusiast who has for many years owned an original 1968 Yenko Chevrolet. Jeff's companies are highly respected manufacturers and purveyors of restoration parts and accessories for classic automobiles. One of his companies, Classic Industries, Inc., is one of the largest (if not *the* largest) supplier of General Motors licensed restoration parts and accessories. In late 2010, Jeff received one of the industry's highest honors when he was inducted into the Automotive Restoration Market Organization (ARMO) Hall of Fame for his significant contributions to the automotive restoration hobby.



Yenko, resulting for example in abandonment of an extensive multi-class YENKO trademark application (Serial No. 77/278.825) that had been filed by a potential competitor.


Petitioner and its alleged licensee (the Yenke Sportscar Club) have had actual and constructive notice of Registrant's uses of the Yenke and sYc trademarks for many years, but chose to sit idly by without raising any objection or taking any adverse action<sup>2</sup> until late 2009. Specifically, Petitioner has had constructive notice of the registration at issue in this cancellation proceeding (Registration No. 2049857) since April 1, 1997 but has done nothing about it until now. Thus, Petitioner's claim for cancellation of this registration is barred by the doctrines of laches, estoppel and abandonment as well as other grounds.

Respondent is the owner of a number of pending United States trademark applications in addition to the issued registrations for YENKO and sYc trademarks listed in the following table:

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<sup>2</sup> On October 17, 2005, the Yenke Sportscar Club, Inc. filed Application Serial No. 78/734212 for the mark YENKO and Application Serial No. 78734240 for the mark SYC. Both of these applications were refused registration under Section 2D over prior registrations and pending applications owned by Respondent and its predecessors. The Yenke Sportscar Club filed no response to these refusals and simply allowed both applications to become abandoned in 2006. Neither Petitioner nor its purported licensee (the Yenke Sportscar Club) took any adverse action against, or served any notice or objection on, Respondent or any predecessor of respondent when it received these refusals to register. In view of these facts, it is difficult to understand the basis for Petitioner's contention that it had no actual knowledge of Respondent's use of these marks until 2009.

Registration Number	Mark	Goods/ Services and Dates of First Use	Registration Date
2049857	YENKO	Toy cars. FIRST USE: 19961022. FIRST USE IN COMMERCE: 19961022	April 1, 1997
3097652	YENKO	Automobiles and Automotive parts and accessories, namely, wheel caps, spoilers and emblems. FIRST USE: 19970401. FIRST USE IN COMMERCE: 19970401	May 30, 2006
2314585	YENKO	Mail order catalogue services featuring parts and accessories for the restoration of classic automobiles; wholesale distributorships featuring parts and accessories for the restoration of classic automobiles. FIRST USE: 19970401. FIRST USE IN COMMERCE: 19970401	February 1, 2000
3779462	YENKO	Automotive vehicle parts, namely, ornamentation in the nature of decorative metal emblems, hoods, exterior trim, rear spoilers, body panels, badges and engine valve covers; Automotive vehicle interior parts, namely, steering wheels. FIRST USE: 19910731. FIRST USE IN COMMERCE: 19911220 Drinking glasses and mugs. FIRST USE: 20071108. FIRST USE IN COMMERCE: 20071108  Clothing, namely, shirts and hats. FIRST USE: 19960715. FIRST USE IN COMMERCE: 19960827	April 20, 2010

3585627		Metal parts for motor vehicles, namely, decorative metal automotive emblems. FIRST USE: 19911220. FIRST USE IN COMMERCE: 19911220 Decals. FIRST USE: 19910116. FIRST USE IN COMMERCE: 19910116 Glass mugs. FIRST USE: 20071211. FIRST USE IN COMMERCE: 20071211 Clothing, namely, t-shirts and caps. FIRST USE: 19961226. FIRST USE IN COMMERCE: 19970102	March 10, 2009
3161668	YENKO	Clothing and headwear accessories, namely shirts, jackets and caps. FIRST USE: 19970401. FIRST USE IN COMMERCE: 19970401	October 24, 2006
3812169	YENKO	Motor vehicle accessories, namely, automobile body emblems and license plate frames. FIRST USE: 19910731. FIRST USE IN COMMERCE: 19911220	June 29, 2010
3083835	YENKO	Vinyl Decals. FIRST USE: 19920115. FIRST USE IN COMMERCE: 19920115	April 18, 2006
3607796	YENKO	Automotive parts and accessories, namely, seat upholstery. FIRST USE: 20080615. FIRST USE IN COMMERCE: 20080615	April 14, 2009
3842228	sYc (stylized)	Wearable garments and clothing, namely, shirts. FIRST USE: 20090918. FIRST USE IN COMMERCE: 20090918	August 31, 2010

### Arguments and Authorities

In order to prevail on its motion to extend its testimony period by seven days, Petitioner is required to set forth, with particularity, the facts said to constitute good cause for the requested extension; mere conclusory allegations lacking in factual detail are not sufficient. Furthermore,

Petitioner must demonstrate that the requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefor. The Board must scrutinize Petitioner's motion carefully to determine whether the requisite good cause has been shown. TBMP §509.01(a).

As explained below, Petitioner's motion to extend should not be considered because it was not served in accordance with the Trademark Rules. Furthermore, even if the Board does consider this motion, Petitioner has clearly failed to establish "good cause" for the requested extension. Most of Petitioner's brief in support of its motion contains highly disputed arguments of counsel regarding the facts and merits of the case. The small portion of Petitioner's brief that does purport to state reasons for the requested extension contain misrepresentations of fact and are clearly inadequate under the standard articulated in TBMP 509.01(a). In reality, the reason Petitioner is seeking this extension is because it has failed to prosecute this action for many months and, with just four (4) days left in its testimony period, decided to make an effort to sneak in testimony from previously undisclosed witnesses in declaration form thereby avoiding crossexamination of its witnesses.

**A. The Motion To Extend Should Not Be Considered Because It Was Not Served In Accordance With 37 C.F.R. §2.119**

Trademark Rule 2.119 provide as follows:

(a) Every paper filed in the United States Patent and Trademark Office in inter partes cases, including notices of appeal, must be served upon the other parties. Proof of such service must be made before the paper will be considered by the Office. A statement signed by the attorney or other authorized representative, attached to or

appearing on the original paper when filed, clearly stating the date and manner in which service was made will be accepted as prima facie proof of service.

(b) Service of papers must be on the attorney or other authorized representative of the party if there be such or on the party if there is no attorney or other authorized representative, and may be made in any of the following ways:

- (1) By delivering a copy of the paper to the person served;
- (2) By leaving a copy at the usual place of business of the person served, with someone in the person's employment;
- (3) When the person served has no usual place of business, by leaving a copy at the person's residence, with a member of the person's family over 14 years of age and of discretion;
- (4) Transmission by the "Express Mail Post Office to Addressee" service of the United States Postal Service or by first-class mail, which may also be certified or registered;
- (5) Transmission by overnight courier.
- (6) Electronic transmission when mutually agreed upon by the parties.

Whenever it shall be satisfactorily shown to the Director that none of the above modes of obtaining service or serving the paper is practicable, service may be by notice published in the *Official Gazette*. (*emphasis added*)

The present motion was served only by e mail with what purports to be a certificate of service by e mail. Respondent has received *no* service of these Declarations by means other than e mail and *no* agreement to allow service by e mail or any other electronic means has been entered into or even discussed. **Buyan Dec. ¶ 13** All prior documents served on Respondent in this case were, in fact, served by first class mail, with a first class mail certificate of service attached. **Buyan Dec. ¶ 13**

The requirements of Trademark Rule 2.119 should not be subject to perfunctory application or enforcement. Attorneys and law firms who represent parties in *inter partes* proceedings routinely have set procedures for receipt and docketing of incoming service documents. In this case, Petitioner merely e mailed a copy of the motion to Respondent's counsel's as an attachment to a blank e mail e mail bearing the subject line "Motion to Extend." It was only by volitionally checking TTABVue that Respondent's counsel was able to confirm that the motion had actually been filed and then personally calculated and calendared the applicable response deadline because the motion had effectively circumvented the intake/docketing system in Respondent's counsel's firm.

Thus, the present motion should be denied without consideration in view of Petitioner's failure to serve the motion as required by 37 C.F.R.2.119(b).

**B) The Motion to Extend, If Considered, Should be Denied Because It Contains Serious Misrepresentations of Fact and Fails to State Good Cause for the Requested Extension**

The first of the three reasons given by Petitioner in support of its Motion to Extend is as follows:

*First, while all four of the Estate's four testimonial declarations, and all thirty-*

*four trial exhibits have been provided to the respondents' attorney and are ready to be timely filed, the TTAB's electronic filing system is apparently unable to accept anything but the Petitioner's First three-page list of testimonial declarants and reference to the exhibits to follow. The TTAB technical support personnel are apparently not answering their telephones.*

This clearly does not constitute good cause for an extension of the testimony period. First, as explained in the accompanying Motion to Strike, Petitioner had no stipulation to permit filing or any testimonial declarations and had failed to provide the required expert and pretrial disclosures. Thus, the attempted filing was in violation of the applicable Trademark Rules. Second, the Trademark Rules do not require *electronic* filing of testimony. The certificate of mailing procedure can also be used. If Petitioner's counsel was unable to upload the documents in a timely fashion, he could and should have made arrangements to get those documents filed on time using the applicable certificate of mailing procedure.

The second of three reasons given by Petitioner in support of its Motion to Extend is as follows:

*Second, the undersigned learned yesterday that one witness-declarant Mr. Lester Quam, is presently vacationing in the Bahamas and therefore temporarily unable to provide his signature.*

As explained in the accompanying Motion to Strike, there was no stipulation to permit filing of any testimonial declarations and Petitioner failed to provide the required expert and pretrial disclosures. Petitioner should have disclosed Mr. Quam as an expert and should have

duly noticed Mr. Quam's oral deposition testimony much earlier in the testimony period, in accordance with the Trademark Rules. The fact is that Petitioner did nothing to secure the testimony of any witness until just a few days before the close of its testimony period, and then attempted to file unauthorized declaration testimony to avoid crossexamination, is not a valid justification for extension of the testimony period.

The third of three reasons given by Petitioner in support of its Motion to Extend is as follows:

*Third, GMCI, the new assignee-respondent, now asserts that it will regard all of the testimonial declarations as "expert testimony"<sup>1</sup> and will insist on taking voir dire (or something like that) from all of them. This seems hardly necessary, particularly since GMCI took no discovery whatever while it had an opportunity to do so. Nevertheless – and perhaps out of an excess of professional courtesy, given the circumstances – the Estate would not oppose such a motion, if undertaken promptly and by electronic means which would not require personal appearances by the witnesses.<sup>2</sup>*

*Fn. 1: Which they clearly are not, being merely the opinions of lay witnesses, based on their own observations and experience, and thus admissible as such under Rule 701, Federal Rules of Evidence (Appendix A).*

*Fn. 2: The undersigned is presently working from Paris, France, and will not return to the U.S. until May 10, 2011.*

This statement contains serious misrepresentations of fact. First, the statement that "GMCI took no



discovery whatever” is false. Respondent served a set of interrogatories and a set of requests for production on Petitioner by First Class Mail on November 19, 2010. **Buyan Dec. ¶16** On December 21, 2010, the following e mail was received from Petitioner’s counsel:

Rob:

Terri Yenke Gould just contacted me about the overdue discovery. She has been dealing with some personal issues (illness in family, etc.) and needs more time. I'll contact you in a day or two to see what can be done.

In the meantime, has Mr. Leonard reviewed our settlement proposal?

Regards,

George

**Buyan Dec. ¶ 17; Ex. I**

On December 28, 2011, Respondent’s counsel sent the following e mail to Petitioner’s counsel:

George:

You indicated in your we mail of 12/21 that you would contact me within the next day or two regarding the past due discovery responses, but I haven’t heard from you. As you know, the discovery cut off date is January 22, 2010, so time is now of the essence. If we have not received your discovery responses by the end of this week we will proceed with a motion to compel in view of the short time period remaining in the discovery period.

We must schedule depositions in advance of the discovery cut off and it is imperative that I have complete responses to the outstanding interrogatories and RFPs *prior* to taking Teri Yenko Gould's deposition. We wish to take the deposition of Teri Yenko Gould at my office in Irvine, California during the week of either January 10th or 17<sup>th</sup>. I expect that the deposition will require one full day. If there is a specific date during that time frame that would be best for her, please let me know. Otherwise, we will serve a written deposition notice for Thursday, January 13, 2011.

Best wishes for the New Year.

Regards,

Robert D. Buyan

**Buyan Dec. ¶ 18; Ex. J**

Petitioner's overdue responses to Respondent's interrogatories and requests for production (including a quantity of produced documents) were finally provided to Respondent on January 3, 2011. **Buyan Dec. ¶ 19** Thus, it is clearly incorrect to state that Respondent failed to take discovery. Furthermore, whether Respondent took discovery or not has no bearing on whether good cause exists for the requested extension of the testimony period.

Furthermore, it is inaccurate to state that Respondent had notified Petitioner that it "*will regard all of the testimonial declarations as "expert testimony"<sup>1</sup> and will insist on taking voir dire (or something like that) from all of them.*" This clearly implies that Respondent had agreed to testimonial declarations in the first place. Nothing could be further from the truth. What Petitioner's

counsel was actually told, in an e mail sent on April 21, 2011, is as follows:

Prior to receiving your e mail of April 19, 2011 requesting that we stipulate to entry of testimony in affidavit form, we had not heard a word from you (or anyone else representing your clients) since early January. We were quite surprised to receive your request for a stipulation just 3 days before the end of Plaintiff's testimony period, especially given the fact that there had been no prior discussion of any such stipulation. Nonetheless, in view of your representation that the proposed testimonial declarations were unlikely to contain disputed facts, we agreed to consider the proposed declarations as well as a draft stipulation (see my e mail of 4/19/11).

Earlier today we received from you five e mails with attached zip files containing documents and a sixth e mail with two proposed declarations attached. One of the declarations was signed by Tom Clary and the other, to our surprise, was signed by you. Your e mail also informed us that a third declaration was currently "being signed" and a fourth was "lost somewhere." We understand that those third and fourth declarations are from Teri Yenko Gould and Lester Quam, Esq.

It is now approximately 4:55PM Pacific time on Thursday April 21, 2011. We still have not received the two remaining proposed

testimonial declarations and you still have not provided any draft stipulation as requested in my e mail of Tuesday April 19, 2011.

We did promptly review the two proposed testimonial declarations that you sent earlier today. Based on your prior representations, we expected these declarations to contain straight forward fact testimony stating essentially undisputed facts. Instead, we were surprised to find that both of the proposed testimonial declarations contain extensive opinion testimony as well as numerous purported facts that are obviously in dispute. Furthermore, we had absolutely no prior notice that you intended to rely on any expert testimony, let alone *your own* personal opinion testimony. Given that you are counsel of record for the plaintiff, it is unreasonable for you to expect us to agree to entry of your personal opinion testimony.

Obviously, we will not stipulate to entry of these testimonial declarations. Given the nature and content of the testimony we must be able to *voir dire* you and Mr. Clary as to your “expert” qualifications and we will not allow this testimony to be entered without cross examination of both you and Mr. Clary. **You could and should have provided preliminary disclosures and noticed these as testimonial depositions much earlier instead of trying to sneak them in without cross examination on the last day of the**

testimony period.

I cannot speak to the content of the other two proposed declarations because you have not provided them to us. Nor can I address the terms of any proposed stipulation because you have not provided any proposed stipulation. However, based on what we have seen in the first 2 declarations we respectfully decline to stipulate to any entry of trial testimony in affidavit or declaration form. Nor will we agree or stipulate to any extension of the Plaintiff's testimony period.

As I noted earlier, we do not believe that good cause exists for extension of the plaintiff's testimony period. However, if you do decide to file a last-minute motion seeking an extension, please be certain to note that you have been notified by counsel for General marketing Capital, Inc. that it will contest such motion. (*emphasis added*)

**Buyan Dec. ¶ 11 ;Ex. G.**

Thus, granting a brief extension for "electronic" voir dire of expert witnesses alleged qualifications would do nothing to cure Petitioner's problem. The simple fact is that Petitioner failed to provide any expert or pretrial disclosures, failed to notice or take any oral or written testimonial depositions during its testimony period and failed to file any notice of reliance. The proposed witnesses haven't testified in accordance with the Trademarrk Rules and haven't been cross-examined. Their

declarations must be stricken from the record because they were filed without the required stipulation. Completing some “electronic” voir dire regarding their alleged expert qualifications is pointless (even if someone were able to determine exactly how voir dire of an expert witness could be accomplished by “electronic” means).

**C. The Motion To Extend, If Considered, Should Be Denied As Moot In View Of Registrant’s Contemporaneously-Filed Motion To Strike**

Upon granting of Respondent’s Motion to Strike, the unauthorized testimonial declarations will no longer be part of the record. The reasons given as ground for this motion to strike will then be moot. Indeed, the Quam declaration (whether signed or not) is of no consequence because no testimony is admissible in declaration form. Moreover, there will be no need to voir dire any expert witnesses because their wrongfully filed declarations will no longer be of record. Thus, this motion to extend is moot in view of the grantable nature of Respondent’s Motion to Strike.

In *Procyon Pharmaceuticals Inc. v. Procyon Biopharma Inc.*, 61 USPQ2d 1542 (TTAB 2001), the Board denied a cancellation petitioner’s motion to extend its testimony period on facts similar to those of the instant case. In *Procyon*, the petitioner moved, on the last day of its testimony period, to extend the testimony period by one month because its principal officer was engaged in rearrangement of laboratory facilities and was unable to participate in preparation and submission of evidence. The Board noted that standard for allowing extension of prescribed period prior to expiration of that period is “good cause” and denied the motion to extend on grounds that the motion failed to provide any information with regard to nature, scale and timing of rearrangement or to explain unavailability of other officers who possessed the requisite information and knowledge to

participate in preparation and submission of evidence or to explain why petitioner waited until last day of testimony period to request extension. The Board in *Procyon* refused to reset testimony dates and, since petitioner's testimony period has expired, dismissed proceeding.

Respondent submits that the reasons given in Petitioner's motion are actually less persuasive than those provided in *Procyon* and that Petitioner's motion to extend should be denied in view of the Board's precedential opinion in *Procyon*. Also, Respondent's Motion to Strike should be granted, thereby rendering this case subject to dismissal under Trademark Rule 2.132.

### CONCLUSION

On the basis of the foregoing, Respondent respectfully requests that the Board deny Petitioner's motion for extension and that the contemporaneously-filed motions to strike and for judgment pursuant to Trademark Rule 2.132 be granted.

May 9, 2011

STOUT, UXA, BUYAN & MULLINS, LLP

/Robert D. Buyan/

Robert D. Buyan  
Attorney for Registrant

4 Venture, Suite 300  
Irvine, CA 92618  
Telephone: (949) 450-1750 (X213)  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **Opposition to Petitioner's "Emergency" Motion to Extend Testimony Period** has been served on George E. Bullwinkel, Esq. by mailing said copy on May 9, 2011, via First Class Mail, postage prepaid to:

George E. Bullwinkel  
Attorney at Law  
425 Woodside Avenue  
Hinsdale, IL 60521

A handwritten signature in black ink, appearing to read 'Robert D. Buyan', is written over a horizontal line.

Robert D. Buyan



**In the Matter of United States Trademark Registration No. 2,049,847**

Respondent.

) Cancellation No.: 92052197

## 1

counsel on April 19, 2011.

6. Attached hereto as Exhibit C is a true and exact copy of an e mail that I received from Petitioner's counsel at about 10:43 PM Pacific time on April 19, 2011.

7. Attached hereto as Exhibit D is a true and exact copy of an e mail that I sent to Petitioner's counsel at about 10:56 PM Pacific time on April 19, 2011.

8. Attached hereto as Exhibit E is a true and exact copy of an e mail that I received from Petitioner's counsel at about 11:37 PM Pacific time on April 19, 2011.

9. During the early morning hours (Pacific Time) on Thursday April 21, 2011 I received a series of e mails from Petitioner's counsel bearing five zip files containing documents, but still no proposed testimonial declarations and no proposed stipulation.

10. Attached hereto as Exhibit F is a true and exact copy of an e mail that I received from Petitioner's counsel on April 21, 2011. The proposed declarations of Clary and Bullwinkel were attached to this e mail.

11. Attached hereto as Exhibit G is a true and exact copy of an e mail that I sent to Petitioner's counsel at around 5:00 PM Pacific time on April 21, 2011.

12. Attached hereto as Exhibit H is a true and exact copy of an e mail that I received from Petitioner's counsel at about 1:02 AM Pacific time on April 22, 2011.

13. Copies of the documentary exhibits and the four purported testimonial declarations filed by Petitioner were sent to me *only* by e mail. Respondent has received no service of these documents

by mail, courier, hand delivery or any means other than e mail. Respondent has not stipulated or agreed to receive service by e mail or any other means not expressly authorized by the Trademark Rules. Based on my review of the case file, all prior documents served on Respondent by Petitioner were served by first class mail, with a first class mail certificate of service attached.

14. Respondent has not stipulated or agreed to allow any testimony in affidavit or declaration form. In fact, I specifically informed Petitioner's counsel by e mail on April 21, 2011 (Exhibit G) that Respondent declined to stipulate to any entry of trial testimony in affidavit or declaration form.

15. Because Respondent received no expert or pretrial disclosures from Petitioner, Respondent did not expect that Petitioner would notice or attempt to enter *any* testimony. At most, it was expected that Petitioner may file a notice of reliance to make certain documents of record. Had Respondent received timely and appropriate expert and pretrial disclosures from Petitioner, Respondent would likely have made different decisions regarding a) the taking of expert discovery, b) obtaining its own rebuttal experts, c) filing of summary judgment or summary adjudication motion(s) and d) other procedural or tactical matters, etc.

16. Respondent served a set of interrogatories and a set of requests for production on Petitioner by First Class Mail on November 19, 2010.

17. Attached hereto as Exhibit I is a true and exact e mail received from Petitioner's counsel on December 21, 2010.

18. Attached hereto as Exhibit J is a true and exact copy of an e mail that I sent to Petitioner's counsel on December 28, 2010.

19. Petitioner's overdue responses to Respondent's interrogatories and requests for production (including a quantity of produced documents) were finally provided to Respondent on January 3, 2011.

I hereby declare that all statements made herein of on my own knowledge are true; that all statements made herein on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of this document and the registration to which it relates.

Signed at Irvine, California this 9<sup>th</sup> day of May, 2011,

A handwritten signature in black ink, appearing to read 'Robert D. Buyan', is written over a horizontal line.

Robert D. Buyan  
Attorney for Registrant

4 Venture, Suite 300  
Irvine, CA 92618  
Telephone: (949) 450-1750 (X213)  
Facsimile: (949) 450-1764  
E Mail: rbuyan@patlawyers.com

**From:** George Bullwinkel [geb@bullwinkel.com]

**Sent:** Tuesday, April 19, 2011 2:56 AM

**To:** Rob Buyan

**Subject:** Yenko v GMCI Cancellation

Rob:

In preparing my proofs for submission by Friday's deadline, I realized that we haven't yet stipulated that both sides may use declarations and affidavits in lieu of live testimony.

The Board encourages this (see *National Distillers and Chemical Corp. v. Industrial Condenser Corp.*, 184 USPQ 757, 758-59 (TTAB 1974)) and I expect that there will be few, if any, undisputed facts (as opposed to legal conclusions) on either side.

Can we stipulate? If not, I will have to file an emergency motion to extend the trial period by 60 days, because I am presently in Paris again through May 10.

Regards,

George

*George E. Bullwinkel*  
*attorney at law*  
*425 Woodside Avenue*  
*Hinsdale, IL 60521*  
*Tel 630-418-2273 Fax 630-214-3210*

**EXHIBIT A**

**From:** Rob Buyan  
**Sent:** Tuesday, April 19, 2011 7:53 PM  
**To:** 'George Bullwinkel'  
**Subject:** RE: Yenko v GMCI Cancellation  
George:

We have heard nothing from you since early January and we have had no prior discussion or correspondence regarding any stipulation to allow trial testimony in affidavit form. It is difficult to understand why you would have just now realized that no such stipulation exists.

I do not see that you would be able to establish good cause, at this late date, for resetting of the testimony periods. We would aggressively oppose any such motion.

As to your request for stipulation, I'm confused by the statement that you believe there will be few if any "undisputed" facts. Did you mean to say that you believe there will be few if any "disputed" facts? If this is the case and you actually believe that your testimonial affidavits merely state undisputed facts, please feel free to send them to me by return e mail along with the proposed stipulation in writable format (e.g., MS Word).

After reviewing the content of the proposed affidavits, we will notify you whether we agree to the requested stipulation.

Regards,

Robert D. Buyan  
STOUT, UXA, BUYAN & MULLINS, LLP  
4 Venture, Suite 300  
Irvine, CA 92618-7384  
Telephone: (949)450-1750  
Facsimile: (949)450-1764

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**EXHIBIT B**

**From:** George Bullwinkel [mailto:geb@bullwinkel.com]  
**Sent:** Tuesday, April 19, 2011 10:43 PM  
**To:** Rob Buyan  
**Subject:** Re: Yenko v GMCI Cancellation

Rob:

Thanks for the prompt reply. I don't think I will have all my proofs ready until Thursday at the latest, so to be on the safe side I may just make a motion for extension anyway. I sense that your client, having hijacked all the Yenko trademarks he could, will be unlikely to let you agree to anything anyway.

I'll be back in touch some time tomorrow.

Regards,

George

*George E. Bullwinkel*  
*attorney at law*  
*425 Woodside Avenue*  
*Hinsdale, IL 60521*  
*Tel 630-418-2273 Fax 630-214-3210*

**EXHIBIT C**

**From:** Rob Buyan  
**Sent:** Tuesday, April 19, 2011 10:56 PM  
**To:** 'George Bullwinkel'  
**Subject:** RE: Yenko v GMCI Cancellation

My client is actually a pretty reasonable guy, and always has been. And, as you well know, he hasn't hijacked anything.

Robert D. Buyan  
STOUT, UXA, BUYAN & MULLINS, LLP  
4 Venture, Suite 300  
Irvine, CA 92618-7384  
Telephone: (949)450-1750  
Facsimile: (949)450-1764

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**EXHIBIT D**



**From:** George Bullwinkel [geb@bullwinkel.com]

**Sent:** Tuesday, April 19, 2011 11:37 PM

**To:** Rob Buyan

**Subject:** Re: Yenke v GMCI Cancellation

Rob:

Then I offer my apology. I love it here in Paris, but sometimes I get cabin fever in our little apartment and say things I shouldn't. I'll send you my proposed testimonial declarations very soon - it's going faster than I anticipated. There will be no surprises.

Regards,

George

*George E. Bullwinkel*  
*attorney at law*  
*425 Woodside Avenue*  
*Hinsdale, IL 60521*  
*Tel 630-418-2273 Fax 630-214-3210*

**EXHIBIT E**

**From:** George Bullwinkel [geb@bullwinkel.com]  
**Sent:** Thursday, April 21, 2011 9:38 AM  
**To:** Rob Buyan  
**Subject:** Re: Archive 5  
**Attachments:** Declaration-Tom.pdf; ATT33167.htm; Declaration-GEB.pdf; ATT33168.htm  
Rob:

Here are two of them.

A third is being signed now; and a fourth is lost somewhere, but I am in hot pursuit.

Thanks for your patience.

George

*George E. Bullwinkel*  
*attorney at law*  
*425 Woodside Avenue*  
*Hinsdale, IL 60521*  
*Tel 630-418-2273 Fax 630-214-3210*

**EXHIBIT F**

**From:** Rob Buyan  
**Sent:** Thursday, April 21, 2011 4:56 PM  
**To:** 'George Bullwinkel'  
**Subject:** RE: Archive 5

Dear George:

Prior to receiving your e mail of April 19, 2011 requesting that we stipulate to entry of testimony in affidavit form, we had not heard a word from you (or anyone else representing your clients) since early January. We were quite surprised to receive your request for a stipulation just 3 days before the end of Plaintiff's testimony period, especially given the fact that there had been no prior discussion of any such stipulation. Nonetheless, in view of your representation that the proposed testimonial declarations were unlikely to contain disputed facts, we agreed to consider the proposed declarations as well as a draft stipulation (see my e mail of 4/19/11).

Earlier today we received from you five e mails with attached zip files containing documents and a sixth e mail with two proposed declarations attached. One of the declarations was signed by Tom Clary and the other, to our surprise, was signed by you. Your e mail also informed us that a third declaration was currently "being signed" and a fourth was "lost somewhere." We understand that those third and fourth declarations are from Teri Yenko Gould and Lester Quam, Esq.

It is now approximately 4:55PM Pacific time on Thursday April 21, 2011. We still have not received the two remaining proposed testimonial declarations and you still have not provided any draft stipulation as requested in my e mail of Tuesday April 19, 2011.

We did promptly review the two proposed testimonial declarations that you sent earlier today. Based on your prior representations, we expected these declarations to contain straight forward fact testimony stating essentially undisputed facts. Instead, we were surprised to find that both of the proposed testimonial declarations contain extensive opinion testimony as well as numerous purported facts that are obviously in dispute. Furthermore, we had absolutely no prior notice that you intended to rely on any expert testimony, let alone *your own* personal opinion testimony. Given that you are counsel of record for the plaintiff, it is unreasonable for you to expect us to agree to entry of your personal opinion testimony.

Obviously, we will not stipulate to entry of these testimonial declarations. Given the nature and content of the testimony we must be able to *voir dire* you and Mr. Clary as to your "expert" qualifications and we will not allow this testimony to be entered without cross examination of both you and Mr. Clary. You could and should have provided preliminary disclosures and noticed these as testimonial depositions much earlier instead of trying to sneak them in without cross examination on the last day of the testimony period.

**EXHIBIT G / FIRST PAGE**

I cannot speak to the content of the other two proposed declarations because you have not provided them to us. Nor can I address the terms of any proposed stipulation because you have not provided any proposed stipulation. However, based on what we have seen in the first 2 declarations we respectfully decline to stipulate to any entry of trial testimony in affidavit or declaration form. Nor will we agree or stipulate to any extension of the Plaintiff's testimony period.

As I noted earlier, we do not believe that good cause exists for extension of the plaintiff's testimony period. However, if you do decide to file a last-minute motion seeking an extension, please be certain to note that you have been notified by counsel for General marketing Capital, Inc. that it will contest such motion.

Regards,

Robert D. Buyan  
STOUT, UXA, BUYAN & MULLINS, LLP  
4 Venture, Suite 300  
Irvine, CA 92618-7384  
Telephone: (949)450-1750  
Facsimile: (949)450-1764

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**EXHIBIT G / SECOND PAGE**

**From:** George Bullwinkel [geb@bullwinkel.com]

**Sent:** Friday, April 22, 2011 1:02 AM

**To:** Rob Buyan

**Subject:** Re: Archive 5

Rob:

Why am I not surprised? You represent a hijacker, after all.

I'll file my motions today.

G.

*George E. Bullwinkel*  
*attorney at law*  
*425 Woodside Avenue*  
*Hinsdale, IL 60521*  
*Tel 630-418-2273 Fax 630-214-3210*

**EXHIBIT H**

**From:** George Bullwinkel [geb@bullwinkel.com]

**Sent:** Tuesday, December 21, 2010 8:55 AM

**To:** Rob Buyan

**Subject:** Yenko

Rob:

Terri Yenko Gould just contacted me about the overdue discovery. She has been dealing with some personal issues (illness in family, etc.) and needs more time. I'll contact you in a day or two to see what can be done.

In the meantime, has Mr. Leonard reviewed our settlement proposal?

Regards,

George

**George E. Bullwinkel**

Attorney at Law

**425 Woodside Avenue**

**Hinsdale, Illinois 60521**

Cell (630) 418-2273

eFax (630) 214-3210

[geb@bullwinkel.com](mailto:geb@bullwinkel.com)

**EXHIBIT I**

**From:** Rob Buyan  
**Sent:** Tuesday, December 28, 2010 5:04 PM  
**To:** 'George Bullwinkel'  
**Subject:** RE: Yenke  
George:

You indicated in your we mail of 12/21 that you would contact me within the next day or two regarding the past due discovery responses, but I haven't heard from you. As you know, the discovery cut off date is January 22, 2010, so time is now of the essence. If we have not received your discovery responses by the end of this week we will proceed with a motion to compel in view of the short time period remaining in the discovery period.

We must schedule depositions in advance of the discovery cut off and it is imperative that I have complete responses to the outstanding interrogatories and RFPs *prior* to taking Teri Yenke Gould's deposition. We wish to take the deposition of Teri Yenke Gould at my office in Irvine, California during the week of either January 10th or 17<sup>th</sup>. I expect that the deposition will require one full day. If there is a specific date during that time frame that would be best for her, please let me know. Otherwise, we will serve a written deposition notice for Thursday, January 13, 2011.

Best wishes for the New Year.

Regards,

Robert D. Buyan  
STOUT, UXA, BUYAN & MULLINS, LLP  
4 Venture, Suite 300  
Irvine, CA 92618-7384  
Telephone: (949)450-1750  
Facsimile: (949)450-1764

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EXHIBIT J

**From:** George Bullwinkel [geb@bullwinkel.com]

**Sent:** Tuesday, December 28, 2010 5:48 PM

**To:** Rob Buyan

**Subject:** Re: Yenke

Rob:

Thanks for your patience - Terri is just finishing up the discovery answers now.

Would you agree to let me attend the deposition by telephone? That would save a lot of time and expense.

Regards,

George

**George E. Bullwinkel**  
Attorney at Law  
425 Woodside Avenue  
Hinsdale, Illinois 60521  
Cell (630) 418-2273  
eFax (630) 214-3210  
[geb@bullwinkel.com](mailto:geb@bullwinkel.com)

**EXHIBIT K**



**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **Declaration of Robert D. Buyan** has been served on George E. Bullwinkel, Esq. by mailing said copy on May 9, 2011, via First Class Mail, postage prepaid to:

George E. Bullwinkel  
Attorney at Law  
425 Woodside Avenue  
Hinsdale, IL 60521

A handwritten signature in dark ink, appearing to read 'Robert D. Buyan', is written over a horizontal line.

Robert D. Buyan

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of United States Trademark Registration No. 2,049,847

Terri Yenko Gould, Executor	)	
	)	Cancellation No.:92052197
Petitioner,	)	
	)	
vs.	)	
	)	
General Marketing Capital, Inc./Supercar	)	
Collectables Limited	)	
	)	
Respondent.	)	
_____	)	

**Motion to Strike Testimonial Declarations Filed by Petitioner**

Respondent/Assignee (hereinafter "Respondent") General Marketing Capital, Inc. moves to strike each of the four (4) testimonial declarations and accompanying exhibits (collectively referred to herein as the "Declarations") filed by Petitioner Terri Yenko Gould (hereinafter "Petitioner"). The grounds for this motion are that: a) *no* stipulation (written or otherwise) has been agreed to which would permit filing of *any* testimony in affidavit or declaration form; b) Petitioner Failed to Provide any Expert Disclosure as Required by 37 C.F.R. §2.120 or Pretrial Disclosure as Required by 37 C.F.R. §2.121 and the Board's order of November 10, 2010 (hereinafter the "Scheduling Order") and c) the Declarations were not served in accordance with 37 C.F.R. §2.119. While any one of these grounds alone would be sufficient, the combination of these grounds overwhelmingly warrants granting of this motion.

Submitted in support of this motion is the Declaration of Robert D. Buyan, Esq. and

accompanying Exhibits A through K.

**RELEVANT FACTS**

The Scheduling Order of November 10, 2011 set forth the following deadlines:

**Expert Disclosures Due 12/23/10**

**Discovery Closes 1/22/11**

**Plaintiff's Pretrial Disclosures 3/8/11**

**Plaintiff's 30-day Trial Period Ends 4/22/11**

**Defendant's Pretrial Disclosures 5/7/11**

**Defendant's 30-day Trial Period Ends 6/21/11**

**Plaintiff's Rebuttal Disclosures 7/6/11**

**Plaintiff's 15-day Rebuttal Period Ends 8/5/11**

Petitioner and Petitioner's counsel had *no* correspondence or communication with Respondent or Respondent's counsel from January 7, 2011 until April 19, 2011. **Buyan Dec. ¶1.** Petitioner failed to serve or file *any* expert disclosure as required by Fed.R.Civ.P. 26, 37 C.F.R. §2.120 and the Scheduling Order. **Buyan Dec. ¶2.** Nor did Petitioner serve or file *any* Pretrial Disclosure as required by Fed.R.Civ.P. 26, 37 C.F.R. §2.121 and the Scheduling Order. **Buyan Dec. ¶ 3.**

On April 19, 2011, just four (4) days before the close of Petitioner's testimony period,

Petitioner's counsel sent an e mail to Respondent's counsel acknowledging that no stipulation had been entered into for filing of testimony in affidavit or declaration form and inquiring as to whether Respondent would agree to such stipulation. This e mail also stated that if Respondent would not agree to the requested stipulation Petitioner would "have to file an emergency motion to extend the trial period by 60 days, because I [*Petitioner's counsel*] am presently in Paris again through May 10." **Buyan Dec. ¶4 ; Ex. A.** The substance of this e mail clearly indicates that Petitioner's counsel was fully aware of a) the need for a stipulation before testimony in affidavit or declaration form could be properly filed and b) the fact that no such stipulation existed.

On April 19, 2011, Respondent's counsel sent an e mail response pointing out that Respondent had heard nothing from Petitioner since early January and that there had been no previous discussion or correspondence regarding any stipulation to allow trial testimony in affidavit form. Nonetheless, in that e mail, Respondent's counsel also indicated that if Petitioner's counsel actually believed that the proposed testimonial affidavits would "merely state undisputed facts" he should feel free to send them to Respondent's counsel by return e mail along with the proposed stipulation in an editable (e.g., MS Word) format. **Buyan Dec. ¶5 ; Ex. B.**

Late night (10:43 PM Pacific Time) on Tuesday April 19, 2011, Petitioner's counsel sent a brief e mail to Respondent's counsel, the text of which reads as follows:

Thanks for the prompt reply. I don't think I will have all my proofs ready until Thursday at the latest, so to be on the safe side I may just make a motion for extension anyway. I sense that your client, having hijacked all the Yenke trademarks he could, will be unlikely to let

you agree to anything anyway. I'll be back in touch some time tomorrow.

**Buyan Dec. ¶ 6; Ex. C.** It is clear from this e mail that, as of the night of Tuesday April 19, 2011, Petitioner's counsel hadn't yet even written the testimonial declarations for which he was requesting stipulation. Furthermore, no expert or pretrial disclosures had been provided and no testimony was taken or noticed during the first 27 days of Petitioner's testimony period, which had opened on March 23, 2011. Then, just 4 days before the close of the testimony period, Petitioner decided to throw together some last minute declarations containing highly argumentative testimony and seek a quick stipulation for their entry.

A few minutes later, at 10:56 PM (Pacific Time) on April 19, 2011, Respondent's counsel replied as follows:

My client is actually a pretty reasonable guy, and always has been. And, as you well know, he hasn't hijacked anything.

**Buyan Dec. ¶ 7; Ex. D.**

Shortly thereafter, at 11:36 PM (Pacific Time) April 19, 2011, Petitioner's counsel responded as follows:

Then I offer my apology. I love it here in Paris, but sometimes I get cabin fever in our little apartment and say things I shouldn't. I'll send you my proposed testimonial declarations very soon - it's going faster than I anticipated. There will be no surprises.

**Buyan Dec. ¶8; Ex. E.**

During the early morning hours (Pacific Time) on Thursday April 21, 2011 (the day before the close of Plaintiff's testimony period), Petitioner's counsel sent to Respondent's counsel five zip files containing documents, but still no proposed testimonial declarations and no proposed stipulation.

**Buyan Dec. ¶9**

At 9:11AM (Pacific Time) on Thursday April 21, 2011 Respondent's counsel sent an e mail to Petitioner's counsel, stating that the five emails with document exhibits attached had been received but inquiring as to when the proposed testimonial declarations and the proposed written stipulation would be provided. Then, at 9:48AM (Pacific Time) on Thursday April 21, 2011 Petitioner's counsel sent an e mail to Respondent's counsel, stating as follows:

Here are two of them.

A third is being signed now; and a fourth is lost somewhere, but I am in hot pursuit.

Thanks for your patience.

**Buyan Dec. ¶ 10; Ex. F** The two declarations that were attached to this e mail were the Declaration of Thomas Clary and the Declaration of George Bullwinkel, Esq. (i.e., Petitioner's counsel of record). These proposed testimonial declarations are far from statements of undisputed fact. Rather, they are replete with statements of disputed fact and unsupported, unqualified opinion testimony. Having

received no expert or pretrial disclosures from Petitioner, and based on counsel's prior promise of "no surprises," Respondent had no expectation or foresight that these proposed declarations would contain the testimony that they do contain. Nor could Respondent have guessed that Petitioner would attempt to introduce testimony from its own counsel of record.

After patiently waiting all day on Thursday April 21, 2011 for receipt of the other two proposed declarations and the proposed stipulation (which was *never* received), Respondent's counsel sent the following e mail to Petitioner's counsel:

Prior to receiving your e mail of April 19, 2011 requesting that we stipulate to entry of testimony in affidavit form, we had not heard a word from you (or anyone else representing your clients) since early January. We were quite surprised to receive your request for a stipulation just 3 days before the end of Plaintiff's testimony period, especially given the fact that there had been no prior discussion of any such stipulation. Nonetheless, in view of your representation that the proposed testimonial declarations were unlikely to contain disputed facts, we agreed to consider the proposed declarations as well as a draft stipulation (see my e mail of 4/19/11).

Earlier today we received from you five e mails with attached zip files containing documents and a sixth e mail with two proposed declarations attached. One of the declarations was signed by Tom Clary and the other, to our surprise, was signed by you. Your e mail

also informed us that a third declaration was currently “being signed” and a fourth was “lost somewhere.” We understand that those third and fourth declarations are from Teri Yenko Gould and Lester Quam, Esq.

It is now approximately 4:55PM Pacific time on Thursday April 21, 2011. We still have not received the two remaining proposed testimonial declarations and you still have not provided any draft stipulation as requested in my e mail of Tuesday April 19, 2011.

We did promptly review the two proposed testimonial declarations that you sent earlier today. Based on your prior representations, we expected these declarations to contain straight forward fact testimony stating essentially undisputed facts. Instead, we were surprised to find that both of the proposed testimonial declarations contain extensive opinion testimony as well as numerous purported facts that are obviously in dispute. Furthermore, we had absolutely no prior notice that you intended to rely on any expert testimony, let alone *your own* personal opinion testimony. Given that you are counsel of record for the plaintiff, it is unreasonable for you to expect us to agree to entry of your personal opinion testimony.

Obviously, we will not stipulate to entry of these testimonial declarations. Given the nature and content of the testimony we must



be able to *voir dire* you and Mr. Clary as to your “expert” qualifications and we will not allow this testimony to be entered without cross examination of both you and Mr. Clary. You could and should have provided preliminary disclosures and noticed these as testimonial depositions much earlier instead of trying to sneak them in without cross examination on the last day of the testimony period.

I cannot speak to the content of the other two proposed declarations because you have not provided them to us. Nor can I address the terms of any proposed stipulation because you have not provided any proposed stipulation. However, based on what we have seen in the first 2 declarations we respectfully decline to stipulate to any entry of trial testimony in affidavit or declaration form. Nor will we agree or stipulate to any extension of the Plaintiff’s testimony period.

As I noted earlier, we do not believe that good cause exists for extension of the plaintiff’s testimony period. However, if you do decide to file a last-minute motion seeking an extension, please be certain to note that you have been notified by counsel for General marketing Capital, Inc. that it will contest such motion. (*emphasis added*)

**Buyan Dec. ¶11;Ex. G.**

Petitioner's counsel then responded with an e mail acknowledging Respondent's refusal to stipulate to entry of testimony in declaration form, engaging in further name calling and indicating that Petitioner's "motions" would be filed the following day. **Buyan Dec. ¶12;Ex. H.**

To Respondent's surprise, *after having been clearly informed that Respondent declined to stipulate to entry of any declaration testimony*, Petitioner proceeded with attempted (but apparently unsuccessful) electronic filing of its testimonial declarations (only 3 of which were signed) on the last day of the testimony period. In so doing, Petitioner failed to inform the Board that it was filing the testimonial declarations in the absence of any stipulation or agreement to permit their filing. Along with the testimonial declarations, Petitioner filed an "emergency" motion to extend the testimony period by only 7 days rather than 60 days as had previously been stated. The stated reasons for the requested 7 day extension is to allow Petitioner to obtain a signature on the fourth declaration, to finish uploading of each entire document to the USPTO's server and to permit the Respondent to take "electronic" voir dire of the Estate's testimonial witnesses "if it still thinks it necessary to do so."

On Saturday April 23, 2011, one day *after* the close of the testimony period, Petitioner's counsel did e mail to Respondent's counsel a signed copy of the declaration that had been originally filed without signature (Quam Declaration). Thus, there are a total of four Declarations at issue.

Copies of the documentary exhibits, the Declarations and the motion to extend were sent to Respondent's *only* by e mail. Respondent received no service of these documents by mail, courier or hand delivery as required by 37 CFR § 2.119(b). As ultimately filed, these documents appear to

bear certificates of service indicating that they had been served by electronic mail. However, there has been *no stipulation between the parties to permit service by e mail*. Buyan Dec. ¶ 13

### **ARGUMENTS AND AUTHORITIES**

#### **A. This Motion to Strike Must be Granted Because No Stipulation Was Entered Into To Permit Filing Of Any Testimony In Affidavit Or Declaration Form**

The introduction of evidence in inter partes proceedings before the Board is governed by the Federal Rules of Evidence, the relevant portions of the Federal Rules of Civil Procedure, the relevant provisions of Title 28 of the United States Code, and the rules of practice in trademark cases (i.e., the provisions of Part 2 of Title 37 of the Code of Federal Regulations). These applicable rules allow witness testimony to be introduced *only* in the form of transcripts or videotapes of live testimonial depositions taken by a party during its testimony period (including documents and other exhibits made of record with appropriate identification and introduction during the course of such the deposition). These rules also allow certain types of documents, such as official records and printed publications described in 37 CFR § 2.122(e) and discovery responses under 37 CFR § 2.120(j), to be placed into evidence by way of a timely filed notice of reliance. These rules do not, however, allow any testimony to be submitted in the form of an affidavit or declaration unless stipulated to in writing by all parties.

In this instance, not only was there no stipulation to allow filing of any trial testimony in declaration form, Petitioner's counsel had been expressly informed just one day earlier that Respondent declined "to stipulate to any entry of trial testimony in affidavit or declaration form." Buyan Dec. ¶14; Ex G Thus, the Declarations (including their exhibits) were obviously filed in

willful disregard of 37 CFR § 2.122.

Precedential opinions of this Board require the Declarations (including their exhibits) to be stricken when there has been no stipulation to permit filing of any testimony in affidavit or declaration form. See, *Order Sons of Italy in America v. Memphis Mafia Inc.*, 52 USPQ2d 1364, 1365 n.3 (TTAB 1999); *Hard Rock Café Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1403-04 n.9 (TTAB 1998).

**B. Additionally This Motion to Strike Must be Granted Because Petitioner Failed to Provide any Expert Disclosures as Required by 37 C.F.R. §2.120 or Pretrial Disclosures as Required by 37 C.F.R. 2.121.**

Trademark Rule 2.121(e) provides, in part, that:

...no later than fifteen days prior to the opening of each testimony period ... the party scheduled to present evidence must disclose the name and, if not previously provided, the telephone number and address of each witness from whom it intends to take testimony, or may take testimony if the need arises, general identifying information about the witness, such as relationship to any party, including job title if employed by a party, or, if neither a party nor related to a party, occupation and job title, a general summary or list of subjects on which the witness is expected to testify, and a general summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness ...

Trademark Rule 2.123(e)(3) provides as follows:

Every adverse party shall have full opportunity to cross-examine each witness. If pretrial disclosures or the notice of examination of witnesses served pursuant to paragraph (c) of this section are improper or inadequate with respect to any witness, an adverse party may cross-examine that witness under protest while reserving the right to object to the receipt of the testimony in evidence. Promptly after the testimony is completed, the adverse party, to preserve the objection, shall move to strike the testimony from the record, which motion will be decided on the basis of all the relevant circumstances. A motion to strike the testimony of a witness for lack of proper or adequate pretrial disclosure may seek exclusion of the entire testimony, when there was no pretrial disclosure, or may seek exclusion of that portion of the testimony that was not adequately disclosed in accordance with § 2.121(e). A motion to strike the testimony of a witness for lack of proper or adequate notice of examination must request the exclusion of the entire testimony of that witness and not only a part of that testimony.

Petitioner failed to serve any pretrial disclosures as required by Fed. R. Civ. P. 26, Trademark Rule 2.121(e) and the Scheduling Order. **Buyan Dec. ¶ 3** The Board has held that such failure to provide the required pretrial disclosure is grounds to strike the proffered testimony. See, *Jules Jurgensen/Rhapsody, Inc. v. Baumberger*, 91 U.S.P.Q.2d 1443 (TTAB 2009). Thus, the entirety of each Declaration (including its exhibits) must be stricken from the record in accordance with Trademark Rule 2.123(e)(3).

Additionally, the Declarations clearly contain expert opinion testimony, including opinions

with respect to the purported fame of Donald Yenke, existence of and ownership of common law trademark rights, likelihood of confusion, strength of the mark at issue, reasons for the continued existence of Yenke automobiles, the nature of consumer perceptions, etc. With respect to such expert testimony, Trademark Rule 2.120(2) provides in pertinent part as follows:

Disclosure of expert testimony must occur in the manner and sequence provided in Federal Rule of Civil Procedure 26(a)(2), unless alternate directions have been provided by the Board in an institution order or any subsequent order resetting disclosure, discovery or trial dates. If the expert is retained after the deadline for disclosure of expert testimony, the party must promptly file a motion for leave to use expert testimony. Upon disclosure by any party of plans to use expert testimony, whether before or after the deadline for disclosing expert testimony, the Board may issue an order regarding expert discovery and/or set a deadline for any other party to disclose plans to use a rebuttal expert.

The Scheduling Order set a deadline of December 23, 2010 for service and filing of Expert Disclosures as required by Trademark Rule 2.120(2). Petitioner failed to file or serve any such Expert Disclosures. **Buyan Dec. ¶ 2.** Thus, in addition to the grounds stated above which pertain to *all* of the Declarations, the Board must also strike the Declarations because they clearly contain expert opinion testimony, which was not previously disclosed and for which the witnesses have not been qualified or cross-examined.

Furthermore, in addition to the grounds stated above, additional as somewhat bizarre grounds exist to strike the Bullwinkel Declaration in its entirety, i.e., Mr. Bullwinkel is actually Petitioner's

counsel of record. It is axiomatic that Mr. Bullwinkel cannot serve as both counsel of record and a trial witness in the same proceeding. Had Petitioner provided an expert or pretrial disclosure indicating that it intended to introduce trial testimony from Mr. Bullwinkel, such would have necessitated disqualification of Mr. Bullwinkel as counsel of record. See, TBMP §513.02 Thus, at this stage of the proceeding, the only reasonable solution is to strike Mr. Bullwinkel's ill-conceived and unauthorized trial testimony declaration.

Because Petitioner had provided no expert or pretrial disclosures and in view of the obvious weakness of Petitioner's case, once the pretrial disclosure deadline had passed, Respondent reasonably did not expect *any* testimony from Petitioner. At most, there was a chance that Petitioner may file a notice of reliance to make certain documents of record. Had Respondent received timely and appropriate expert and pretrial disclosures from Petitioner, Respondent would likely have made different decisions regarding a) the taking of expert discovery, b) obtaining its own rebuttal experts, c) filing of summary judgment or summary adjudication motion(s) re laches, abandonment and other defenses and d) other procedural or tactical matters, etc. In this regard, Petitioner's failure to provide timely expert and pretrial disclosures has significantly prejudiced Respondent and constitutes a separate and additional reason for striking the proffered testimonial declarations. *Jules Jurgensen/Rhapsody, Inc. v. Baumberger*, 91 U.S.P.Q.2d 1443 (TTAB 2009).

C. **Additionally This Motion to Strike Must be Granted Because Petitioner Failed to Serve the Declarations In Accordance with 37 C.F.R.2.119(b).**

As if the above-stated grounds to strike the Declarations weren't egregious enough, additional grounds to strike the Declarations exists because they were not been served in accordance with Sections (a) and (b) of Trademark Rule 2.119, which provide as follows:

(a) Every paper filed in the United States Patent and Trademark Office in inter partes cases, including notices of appeal, must be served upon the other parties. Proof of such service must be made before the paper will be considered by the Office. A statement signed by the attorney or other authorized representative, attached to or appearing on the original paper when filed, clearly stating the date and manner in which service was made will be accepted as prima facie proof of service.

(b) Service of papers must be on the attorney or other authorized representative of the party if there be such or on the party if there is no attorney or other authorized representative, and may be made in any of the following ways:

- (1) By delivering a copy of the paper to the person served;
- (2) By leaving a copy at the usual place of business of the person served, with someone in the person's employment;
- (3) When the person served has no usual place of business, by leaving a copy at the person's residence, with a member of the person's family over 14 years of age and of discretion;
- (4) Transmission by the "Express Mail Post Office to Addressee" service of the United States Postal Service or by first-class mail, which may also be certified or



registered;

(5) Transmission by overnight courier.

(6) Electronic transmission when mutually agreed upon by the parties.

Whenever it shall be satisfactorily shown to the Director that none of the above modes of obtaining service or serving the paper is practicable, service may be by notice published in the *Official Gazette*. (*emphasis added*)

In this instance, Petitioner's counsel sent a series of e mails to Respondent's counsel on April 22 with attached zip files containing document exhibits, followed by other e mails containing copies of the Declarations (i.e., without accompanying exhibits). Respondent received *no* service of these Declarations or exhibits by any means other than e mail and *no* agreement to allow service by e mail or any other electronic means has been entered into or even discussed. **Buyan Dec. ¶ 13** All prior documents served on Respondent in this case were, in fact, served by first class mail, with a first class mail certificate of service attached. **Buyan Dec. ¶ 13**

Upon checking the TTAB website, it appears that Petitioner has electronically filed approximately 17 documents labeled as "Testimony for Plaintiff," some as recently as May 1, 2011. None of these documents were served in accordance with Trademark Rule 2.119(b) and, thus, such documents must be stricken and not considered by the Board.

### CONCLUSION

On the basis of the foregoing, Respondent respectfully requests that the Board strike all

testimonial declarations and exhibits filed by Petitioner. An opposition to the Petitioner's motion for a 7 day extension of the testimony period is being filed separately, as well as a motion for judgment in favor of Respondent pursuant to Trademark Rule 2.132.

**May 9, 2011**

**STOUT, UXA, BUYAN & MULLINS, LLP**

**/Robert D. Buyan/**

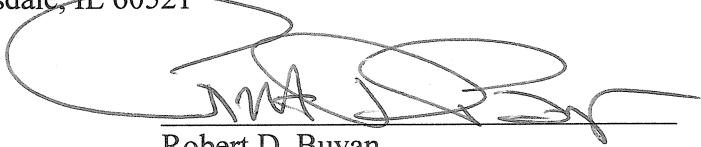
**Robert D. Buyan  
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Facsimile: (949) 450-1764  
E Mail: [rbuyan@patlawyers.com](mailto:rbuyan@patlawyers.com)**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **Motion to Strike Testimonial Declarations Filed by Petitioner** has been served on George E. Bullwinkel, Esq. by mailing said copy on **May 9, 2011**, via First Class Mail, postage prepaid to:

George E. Bullwinkel  
Attorney at Law  
425 Woodside Avenue  
Hinsdale, IL 60521

A handwritten signature in black ink, appearing to read 'R. D. Buyan', is written over a horizontal line.

Robert D. Buyan

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of United States Trademark Registration No. 2,049,847

Terri Yenke Gould, Executor	)	
	)	Cancellation No.:92052197
Petitioner,	)	
	)	
vs.	)	
	)	
General Marketing Capital, Inc./Supercar	)	
Collectables Limited	)	
	)	
Respondent.	)	
_____	)	

**Motion for Judgment Pursuant to 37 C.F.R. § 2.132**

Applicant hereby moves for the judgment on the record dismissing this cancellation pursuant to 37 C.F.R. § 2.132 upon the Board's denial of Petitioner's "Emergency" Motion to Extend Testimony Period and its granting of Respondent's Motion to Strike Testimonial Declarations Filed by Petitioner, as filed herewith.

Respectfully submitted,

May 9, 2011

STOUT, UXA, BUYAN & MULLINS, LLP

/Robert D. Buyan/

Robert D. Buyan  
Attorney for Registrant

4 Venture, Suite 300  
Irvine, CA 92618  
Telephone: (949) 450-1750 (X213)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **Motion for Judgment Pursuant to 37 C.F.R. § 2.132** has been served on George E. Bullwinkel, Esq. by mailing said copy on **May 9, 2011**, via First Class Mail, postage prepaid to:

George E. Bullwinkel  
Attorney at Law  
425 Woodside Avenue  
Hinsdale, IL 60521

A handwritten signature in black ink, appearing to read 'Robert D. Buyan', is written over a horizontal line.

Robert D. Buyan